

**January 17, 2008**

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: WTAE-TV

Date of Filing: December 18, 2007

Case Number: TFA-0234

On December 18, 2007, WTAE-TV (WTAE) filed an Appeal from a determination issued to it by the Department of Energy's Pittsburgh Naval Reactors Office (PNRO). In that determination, PNRO withheld documents in response to a request for information that WTAE filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require PNRO to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and is in the public interest. 10 C.F.R. § 1004.

**I. Background**

On November 2, 2007, WTAE sent a FOIA request to the FOIA Office at DOE Headquarters, for the two most recent annual performance evaluations conducted by the National Nuclear Security Administration (NNSA) of the Bechtel-Bettis plant in West Mifflin, Pennsylvania. *See* Electronic Mail Message from WTAE to DOE (November 2, 2007). On November 6, 2007, the request was forwarded to the Office of Naval Reactors at DOE Headquarters because any document responsive to the request, if it existed, would fall under the jurisdiction of that office. The Office of Naval Reactors then forwarded the request to PNRO to conduct the search.

PNRO conducted a search and located documents responsive to WTAE's request. In its determination letter dated November 27, 2007, PNRO withheld the documents in their entirety under the deliberative process privilege of Exemption 5, claiming that the responsive material is interim contractor performance evaluations that are designated as "source selection information"<sup>1</sup> created to

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<sup>1</sup> "Source Selection Information" means information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly. 41 U.S.C.A. § 423(f)(2). PNRO claims that pursuant to subpart 42.15 of the Federal Acquisition Requisition (FAR), contractor performance evaluations are designated "Source Selection Information," and only releasable three years after completion of contract performance. *See* Determination Letter.

support future contract award decisions. *See* Letter from PNRO to WTAE, November 27, 2007 (Determination Letter). In withholding the documents, PNRO asserts that the subject evaluations are pre-decisional and deliberative, and as such, fall within the deliberative process privilege covered by Exemption 5 of the FOIA. *Id.* On December 18, 2007, WTAE filed this appeal of PNRO's decision to withhold information under Exemption 5.

## II. Analysis

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). The deliberative process privilege is often invoked under Exemption 5, and is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). The privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to the general rule that the deliberative process privilege does not protect factual information. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In its determination letter dated November 27, 2007, PNRO withheld the evaluations in their entirety from WTAE, claiming that the documents contain information that is predecisional and part of the deliberative process. We have reviewed these documents and believe that PNRO improperly withheld them under Exemption 5.

PNRO argues that the primary function of these evaluations is "to support future contract award decisions" and as such, these documents are predecisional in nature. *See* Determination Letter. We disagree. Performance evaluations are systematic determinations of merit, worth or significance. The primary purpose of performance evaluations is to provide the subject with feedback for performance and recommendations for improvement.

Our office conducted a *de novo* review of the documents PNRO withheld from WTAE in their entirety. Each evaluation expresses the evaluator's opinion of the contractor's performance at the time the evaluation was conducted. PNRO informed us that although the interim evaluations may be eventually used to award future contracts or contract extensions, the evaluations are not drafts. *See* Memorandum of Telephone Conversation between Clifford Nunn, PNRO, and Avery Webster, OHA (January 11, 2008). They reflect final agency positions that are not subject to review or revision. *Id.*

We do not believe that Exemption 5 should be applied so broadly as to withhold final agency documents that may ultimately feed into a larger evaluation process. Where interim performance evaluations reflect the agency's final decision, the documents are not predecisional and cannot be shielded by the deliberative process privilege.

Accordingly, we shall remand this matter to PNRO. On remand, PNRO must review the responsive material and issue a new determination that either releases that material or justifies the withholding of any portions of the documents. If PNRO determines that withholding is appropriate, it should memorialize its consideration of segregation of non-exempt material pursuant to 10 C.F.R. § 1004.7(b) and the public interest pursuant to 10 C.F.R. § 1004.1.

It Is Therefore Ordered That:

- (1) The Appeal filed by WTAE-TV on December 18, 2007, OHA Case No. TFA-0234, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.
- (2) This matter is hereby remanded to the Pittsburgh Naval Reactors Office which shall issue a new determination in accordance with the instructions set forth above.
- (3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: January 17, 2008